Filed 8/6/15 Murray v. Maginnis CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| JAMES TONY MURRAY, an individual, et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>BRIAN MAGINNIS,<br><br>Defendant and Respondent. | B257301<br><br>(Los Angeles County Super. Ct. No. VC061099) |

APPEAL from a judgment and postjudgment order of the Superior Court of the County of Los Angeles, Roger Ito, Judge. Affirmed.

The Zacher Firm, Dieter Zacher for Plaintiffs and Appellants.

Law Office of Norman Rasmussen, Mark B. Simpkins for Defendant and Respondent.

## INTRODUCTION

Plaintiffs and appellants James Murray and American Truck and Tools Rentals, Inc. (plaintiffs) appeal from the trial court's judgment entered after an order granting summary adjudication of plaintiffs' promissory fraud claim and from the court's postjudgment order awarding attorney fees to defendant and respondent Brian Maginnis (defendant). According to plaintiffs, the trial court erred when it concluded that there were no triable issues of fact concerning defendant's fraudulent intent and plaintiffs' justifiable reliance. Plaintiffs further contend that the trial court erred when it concluded that defendant was entitled to attorney fees because the lease and purchase option agreement upon which plaintiffs sued did not contain an attorney fees provision. Plaintiffs also contend that the trial court abused its discretion in determining the amount of attorney fees to award.

We hold that plaintiffs failed to raise a triable issue of fact on their promissory fraud claim because (i) there was no evidence that defendant did not intend to perform the alleged false promise at the time he made it; and (ii) plaintiffs' alleged reliance on defendant's alleged false promise was unreasonable as a matter of law. We also hold that the trial court did not err when it determined that defendant was entitled to an award of attorney fees as the prevailing party under the parties' global agreement, which included a stock purchase agreement with an attorney fees provision. And, because plaintiffs failed to include in the record on appeal the reporter's transcript of the attorney fees hearing, we affirm the trial court's order setting the reasonable amount of attorney fees to award based on the inadequacy of the record.

## FACTUAL BACKGROUND

### A. Defendant's Facts[1]

In May 2004, plaintiffs and defendant entered into a lease for two commercial properties[2] that contained a purchase option that provided: "After the initial term [plaintiff] Tony James Murray will be [*sic*] earn the option to purchase the leasehold land and improvements for the agreed to fair market value and or will be granted the first right of refusal to purchase said property." In April 2012, plaintiffs sent defendant two letters attempting to exercise the purchase option for the price of $1,935,000 for the two properties. Defendant responded in a letter which stated, in part, "I do not agree to the offer."

In June 2012, defendant sent plaintiffs an e-mail in which he advised that he would order appraisals for the two properties and forward them to plaintiffs. Defendant also requested that plaintiffs send him a copy of the appraisal upon which their offer was based. In July 2012, defendant sent plaintiffs an e-mail that stated, in part, "As we are all aware, everything in my life is for sale and I am trusting once these appraisals come back we can get to an agreed to price if time permits." In October 2012, defendant sent plaintiffs copies of appraisals that valued the two properties at $2,495,000. Plaintiffs did not agree to purchase the properties for that price and countered at $2,215,000. Defendant rejected that counter offer.

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[1] We only consider defendant's facts that legally were admissible. Thus, we do not consider plaintiffs' objections to defendant's evidence, which objections were not discussed by the parties.

[2] According to plaintiffs, at the same time the parties entered into the lease, the parties also entered into a stock purchase agreement under which plaintiff Murray would acquire defendant's stock in plaintiff American Truck and Tools Rentals, Inc. When defendant thereafter refused to sell his stock, Murray sued him and obtained an order in arbitration requiring defendant to sell his stock to Murray.

The parties continued to negotiate a mutually agreeable price for the purchase of the properties at the mandatory settlement conference in this action. Defendant made an offer to sell at that time, but the parties could not reach an agreement on a price.

## A. Plaintiffs' Facts[3]

### *1. Fraudulent Intent*

Defendant represented to plaintiffs that defendant wanted to sell the business known as American Rentals and the two properties upon which it was located to plaintiffs. Defendant agreed that plaintiffs could purchase initially up to 20% of the stock of American Rentals, and, once that occurred, defendant would agree to sell the company and the properties to plaintiffs.

On May 1, 2004, plaintiffs and defendant entered into a global transaction for the purchase of American Rentals and the properties. Two documents were drafted and executed by the parties to consummate the sale. The parties entered into a stock purchase agreement and a commercial lease agreement.

Defendant drafted the commercial lease agreement and presented it to plaintiffs. Defendant, both verbally and in writing, promised to sell the properties to plaintiffs. Plaintiffs relied on defendant's representations and signed the agreements.

Throughout the course of the parties business relationship, defendant repeatedly stated that he wanted to sell the properties to plaintiffs. Defendant hired an appraiser to appraise the properties.

In March 2013, defendant moved ex parte for an order shortening time to have his motion for judgment on the pleadings heard by the trial court. Up to that point in time, defendant had acted, both verbally and in writing, as if he was going to comply with his agreement to sell the properties to plaintiffs. The filing of the motion for judgment on the

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[3] Although defendant objected to the admissibility of some of plaintiffs' facts, the parties did not address the evidentiary issues. We need not address this issue because for purposes of this appeal, we shall assume that all of plaintiffs' evidence was admissible.

pleadings was the first time that plaintiffs discovered that defendant did not intend to sell the properties to plaintiffs.

On February 22, 2014, defendant listed the properties for sale for a total of $2,900,000.00. Defendant never, verbally or in writing, stated he would sell the properties to plaintiffs for $2,900,000.00.

*2. Justifiable Reliance*

Plaintiffs justifiably relied on defendant's promise to sell them the properties by agreeing to lease the properties upon which the business is located; agreeing to a second term of the commercial lease agreement so that plaintiffs ultimately could purchase the properties as was originally intended by the parties; agreeing to make timely rental payments on the properties and paying a total of $813,804.00 in rent and for maintenance of the properties; agreeing to make improvements to the properties and maintaining the condition of the properties in accordance with the commercial lease agreement; and performing all duties and obligations under the commercial lease agreement.

## PROCEDURAL BACKGROUND

Plaintiffs filed a complaint against defendant asserting causes of action for breach of contract and specific performance based on the alleged purchase option in the lease agreement for the two commercial properties. Defendant filed a motion for judgment on the pleadings on the ground that the option was unenforceable because it did not contain a price term and instead left the price to future agreement by the parties. The trial court granted the motion for judgment on the pleadings with leave to amend.

Plaintiffs then filed the operative first amended complaint asserting the same contract-based claims and, based on defendant's allegedly new position that the option was unenforceable, additional claims for fraud and reformation. Defendant filed a

demurrer and the trial court sustained it without leave to amend as to the contract-based and reformation claims, leaving only the fraud claim.[4]

As to the remaining fraud claim, defendant filed a motion for summary judgment. Plaintiffs opposed the motion, and following a hearing on the motion that was not reported,[5] the trial court granted the motion and entered a judgment in defendant's favor.[6]

Following the entry of judgment, defendant filed a postjudgment motion to recover attorney fees as the prevailing party. After a hearing on that motion, the trial court entered an order awarding defendant $35,313 in attorney fees, but denying defendant's request for a lodestar enhancement. The order provided as follows: "Plaintiff's first amended complaint contained a request for attorney's fees. The attorney fee provision on which defendant relies is found in the parties' 'Buy-Out Agreement,' which involved defendant's agreement to sell his shares of stock in the business. The dispute involving that agreement was resolved in arbitration pursuant to the arbitration clause therein. The parties also signed a lease agreement, which contained neither an attorney's fees clause or an agreement to arbitrate. [¶] Plaintiff argues that the subject action arises out of the lease, so that the attorney's provision contained in the buy-out agreement does not support the fee award sought. Throughout this litigation and in the related case (case number VC063949), plaintiff has taken the position that the two contracts must be read together because the transaction involved a 'global agreement'

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[4] Plaintiffs do not challenge on appeal the trial court's order sustaining the demurrer to their breach of contract, specific performance, and reformation causes of action without leave to amend.

[5] In a letter to the parties, we raised an issue concerning the adequacy of the record, an issue as to which the parties disagree. We do not need to resolve that disagreement as to the orders granting summary judgment and entitling defendant to an award of attorney fees because, based on the record provided, we can conduct a de novo review and affirm those orders on the merits as explained below. As also explained below, however, plaintiffs' abuse of discretion challenge to the order setting the reasonable amount of attorney fees cannot be determined on the record provided.

[6] The record does not contain a tentative ruling, minute order, statement of decision on the summary judgment motion or rulings on evidentiary issues.

between the parties. He cannot now oppose the request for attorney's fees by arguing the buy-out agreement is separate, or that his claims were not premised on the notion of a global agreement inclusive of that agreement. The Court finds that defendant is entitled to reasonable attorney's fees. [¶] In the motion, defendant Maginnis indicates that he spent 117.75 hours in this matter at a (discounted) rate of $300/hour, for a total lodestar amount of $35,313. Counsel requests that the Court approve an enhancement and adjust the recoverable amount upward [because he] voluntarily agreed to reduce his hourly rate to an amount he deems below the market rate. Notwithstanding his arguments to the contrary, this matter was not so complex as to warrant an enhanced fee. See *EnPalm, LC v. Teitler* (2008) 162 Cal.App.4th 770 (setting forth the factors to determine reasonable fees). The matter was resolved in a relatively short period of time and prior to trial. There are no other circumstances which warrant an increase in the lodestar. Accordingly, defendant's motion is granted in the amount of $35,313."

Plaintiffs filed timely notices of appeal from the judgment and the order awarding attorney fees.

## DISCUSSION

### A. Summary Judgment on Promissory Fraud Claim

#### *1. Standard of Review*

Our review of the trial court's ruling on the summary judgment motion is governed by well established principles. "'"A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); see also *id*., § 437c, subd. (f) [summary adjudication of issues].) The moving party bears the burden of showing the court that the plaintiff 'has not established, and cannot reasonably expect to establish,'" the elements of his or her cause of action. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460 [30 Cal.Rptr.3d 797, 115 P.3d 77].)' (*Wilson v.*

*21st Century Ins. Co*. (2007) 42 Cal.4th 713, 720 [68 Cal.Rptr.3d 746, 171 P.3d 1082].) We review the trial court's decision de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1037 [32 Cal.Rptr.3d 436, 116 P.3d 1123].)" (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018.)

"We review the trial court's decision [on a summary judgment motion] de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. (*Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 612 [76 Cal.Rptr.2d 479, 957 P.2d 1313].) In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' (Code Civ. Proc., § 437c, subd. (*o*)(2); see *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal. 4th 826, 854-855 [107 Cal.Rptr.2d 841, 24 P.3d 493].)" (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476-477.)

*2. Legal Principles*

Our Supreme Court has set forth the basic legal principles for promissory fraud as follows: "'The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' [Citations.] [¶] 'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [Citations.] [¶] An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter

into a contract. (*Chelini v. Nieri* (1948) 32 Cal.2d 480, 487 [196 P.2d 915] ['tort of deceit' adequately pled where plaintiff alleges 'defendant intended to and did induce plaintiff to employ him by making promises . . . he did not intend to (since he knew he could not) perform' (fn. omitted)]; *Kuchta v. Allied Builders Corp*. (1971) 21 Cal.App.3d 541, 549 [98 Cal.Rptr. 588], citing *Horn v. Guaranty Chevrolet Motors* (1969) 270 Cal.App.2d 477, 484 [75 Cal.Rptr. 871]; *Squires Dept. Store, Inc. v. Dudum* (1953) 115 Cal.App.2d 320, 323 [252 P.2d 418].) In such cases, the plaintiff's claim does not depend upon whether the defendant's promise is ultimately enforceable as a contract. 'If it is enforceable, the [plaintiff] . . . has a cause of action in tort as an alternative at least, and perhaps in some instances in addition to his cause of action on the contract.' [Citations.] Recovery, however, may be limited by the rule against double recovery of tort and contract compensatory damages. [Citation.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

*3. Analysis*

Plaintiffs contend that because the issues of fraudulent intent and justifiable reliance are questions of fact, the trial court erred by summarily adjudicating their promissory fraud claim. According to plaintiffs, their opposition evidence included facts concerning defendant's conduct from which a reasonable trier of fact could have concluded that defendant did not intend to sell them the properties at the time he represented in the lease agreement that they had a purchase option and right of first refusal. Similarly, plaintiffs argue that their opposition evidence included facts concerning their conduct in entering into the lease, renewing the lease, and performing under the lease from which a reasonable trier of fact could have concluded that the justifiably relied on defendant's repeated promises to sell them the properties.

Contrary to plaintiffs' assertion, they did not submit any evidence that suggested that defendant did not intend to sell them the properties *at the time they entered into the lease and purchase option agreement*. All of plaintiffs' evidence, with the exception of their evidence concerning the motion for judgment on the pleadings, was consistent with

defendant's original promise in the lease and purchase option to sell the properties to plaintiffs at a price to be agreed upon in the future. That conduct consisted of repeated attempts by defendant to negotiate an agreeable purchase price, which conduct did not support any factual inference concerning the requisite fraudulent intent. Moreover, that defendant ultimately failed to sell the properties to plaintiffs was insufficient to show the requisite intent not to perform at the time of contracting. (*Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 156-157 ["[A] claim of fraud cannot be permitted to serve simply as an alternative cause of action whenever an enforceable contract is not formed. Accordingly, in order to support a claim for fraud based on the alleged failure to perform a promise, it must be shown that the promisor did not intend to perform at the time the promise was made. [Citations.] Although it has been suggested that failure to perform a promise is sufficient to prove fraud, '[t]his is not, and has never been the law' . . ."].) And, to the extent defendant's filing of the motion for judgment on the pleadings supported an inference that defendant never intended to sell the properties to plaintiffs, that filing was privileged. (Civ. Code, § 47, subd. (b); *California Physicians' Service v. Superior Court* (1992) 9 Cal.App.4th 1321, 1330.) Moreover, that defendant ultimately took the position that the promise was not enforceable did not support an inference that defendant had no intention of selling the properties at the time of contracting.

In addition, plaintiffs' opposition evidence did not support a reasonable inference that plaintiffs justifiably relied on defendant's promise to sell plaintiffs the properties at a price to be agreed upon in the future. That promise, on its face, was uncertain and open-ended. It was therefore unreasonable for plaintiffs to rely upon it as if it was an unequivocal and unconditional promise to sell the property for a price certain. (See, e.g., *Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1260-1262 [holding that it was unreasonable for a real estate broker to rely on an oral promise that was unenforceable under the statute of frauds].)

### B. Entitlement to Attorney Fees

Plaintiffs contend that the trial court erred when it concluded that defendant was entitled to recover attorney fees based on the "global" agreement between the parties, which the trial court found included the 2004 stock purchase agreement's attorney fees provision. According to plaintiffs, their lawsuit was based solely on the lease agreement and the purchase option contained therein, which lease did not have an attorney fees provision.

In ruling on the entitlement issue, the trial court found that defendant had taken the position in court filings that the parties had entered into a "global" transaction to purchase the rental business and the two properties on which the business was located. The trial court concluded that plaintiffs were therefore prevented from taking the inconsistent position that the stock purchase agreement, along with its attorney fees provision, should not be read together with the lease for purposes of determining whether defendant was entitled to attorney fees.

#### *1. Background*

In an opposition to an ex parte application filed in a related action between the parties, plaintiffs quoted, inter alia, Civil Code section 1642[7] and asserted as follows: "Maginnis is trying to 'bamboozle' this court in to believing that the only agreement between these parties was the Commercial Lease Agreement. That is clearly not the case. This was a 'global' sale of the business and the land. All the documents regarding this transaction should be read together and the true intention of the parties observed."

Moreover, in the first amended complaint, plaintiffs alleged as follows: "5. On May 1, 2004, Murray and Maginnis entered in to an all encompassing business transaction whereby Murray would purchase the business known as American Rentals and the land upon which it sits from Maginnis. Murray had been the CEO of American

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[7] Civil Code section 1642 provides: "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."

Truck & Tools Rentals, Inc., and held 20% of the company stock at the time. Maginnis only had peripheral involvement with the company and held 80% of the company stock at that time. Originally, Maginnis owned American Rentals and the real property on which these businesses are located. Maginnis represented that he wanted to retire and sold the business and real property to Murray."

"10. The parties intended that the sale of American Rentals would be a 'global' sale. In other words, that the business and the land would be sold to Murray. Part one of the sale constituted the purchase of the business. Part two of the sale constituted the sale of the land beneath the business. We are now at part two of the sale. And, Maginnis has failed and refused to complete the sale of the land to Murray."

Plaintiffs followed the foregoing allegations with a prayer for, inter alia, attorney fees. "[Plaintiffs pray f]or attorney fees in an amount determined by the court to be reasonable as authorized by statute or agreement of the parties and according to proof."

*2. Legal Principles*

The trial court did not specify the legal principles upon which it was relying when it concluded that plaintiffs' statements or admissions in certain court filings prevented them from taking the position that the stock purchase agreement and lease should not be read together as one global agreement. But it appears that the trial court was relying on two related legal principles—the rules governing judicial estoppel and judicial admissions.

"'"'"Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] . . .'" [Citation.] The doctrine [most appropriately] applies when: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake."' [Citations.] [¶] '"'The doctrine's dual goals are to

maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.]'"' (*Aguilar* [*v. Lerner* (2004)] 32 Cal.4th 974, 986.) Consistent with these purposes, numerous decisions have made clear that *is an equitable doctrine*, and its application, even where all necessary elements are present, is discretionary. [Citations.]" (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422-423.)

"The admission of fact in a pleading is a 'judicial admission.' Witkin describes the effect of such an admission: 'An admission in the pleadings is not treated procedurally as evidence; i.e., the pleading need not (and should not) be offered in evidence, but may be commented on in argument and relied on as part of the case. And it is fundamentally different from evidence: It is a *waiver of proof* of a fact by conceding its truth, and it has the effect of removing the matter from the issues. Under the doctrine of "conclusiveness of pleadings," a pleader is bound by well pleaded material allegations or by failure to deny well pleaded material allegations. [Citations.]' (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 413, pp. 510-511.) [¶] The law on this topic is well settled by venerable authority. Because an admission in the pleadings forbids the consideration of contrary evidence, any discussion of such evidence is irrelevant and immaterial. (*Braverman v. Rosenthal* (1951) 102 Cal.App.2d 30, 32 [226 P.2d 617].) '"When a trial is had by the Court without a jury, a fact admitted by the pleadings should be treated as 'found.' . . . If the court does find adversely to the admission, such finding should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings . . . . In such case the facts alleged must be assumed to exist. Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not upheld by the admitted facts is erroneous." [Citations.]' (*Welch v. Alcott* (1921) 185 Cal. 731, 754 [198 P. 626].) 'When allegations in a complaint are admitted by the answer (a) no evidence need be offered in their support; (b) evidence is not admissible to prove their untruth; (c) no finding thereon is necessary; (d) a finding contrary thereto is error.' (*Lifton v. Harshman* (1947) 80 Cal.App.2d 422, 431-432 [182 P.2d 222], disapproved on other grounds in *Pao*

*Ch'en Lee v. Gregoriou* (1958) 50 Cal.2d 502, 506 [326 P.2d 135].) . . . [¶] . . . An admission in a pleading is *conclusive* on the pleader. (4 Witkin, Cal. Procedure, *supra*, Pleading, § 415, p. 512.) 'He cannot offer contrary evidence *unless permitted to amend*, and a judgment may rest in whole or in part upon the admission without proof of the fact.' (*Ibid.*, italics added.)" (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271-1272.)

*3. Analysis*

Plaintiffs' statements in opposition to the ex parte application in the related case were submitted to the trial court in this action in defendant's reply in support of his motion for attorney fees. Those statements unequivocally represented to the trial court in the related case that the lease and stock purchase agreements were part of one global transaction and, as a result, must be read together pursuant to Civil Code section 1642. Having taken that position in the related case, plaintiffs arguably were judicially estopped from taking a contrary position in opposition to the attorney fees motion in this case. Although the record is silent on whether plaintiffs gained an advantage in the related case by taking the position that the lease and stock purchase agreement should be read together, """if any matters could have been presented to the court below which would have authorized the order complained of, it will be presumed that such matters were presented."""" (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187 (*Foust*).) Thus, we may presume that the trial court in this case had evidence that the trial court in the related matter accepted and relied upon plaintiffs' representations about the nature and extent of the parties' agreement, and we may imply any fact that will support the trial court's conclusion. (*K.F. v. Superior Court* (2014) 224 Cal.App.4th 1369, 1382, fn. 5.). Because we may infer plaintiffs gained some advantage in the related case based on their representations to the trial court in that case, they were judicially estopped from taking an incompatible position in opposition to the attorney fees motion. Consequently, we conclude the trial court did not err in determining that defendant was entitled under the parties' global agreement to recover reasonable attorney fees as the prevailing party.

Plaintiffs' admissions in their pleading also prevented them from arguing in opposition to the attorney fees motion that the lease agreement should be read separate and apart from the stock purchase agreement. Based on those admissions, it was established as a matter of fact that the lease and stock purchase agreement "were made as part of substantially one transaction." (Civ. Code, § 1642.) Because under the rules relating to judicial admissions, plaintiffs could not offer evidence demonstrating that the two agreements were not substantially part of the same transaction, the trial court did not err in concluding that they should be read together under Civil Code section 1642. (See *Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1126-1127 [allegation in pleading that the parties' agreement included the written terms of the exhibits attached to the pleading constituted a binding admission that the parties' agreement included a limitation on liability clause in the exhibits].) Thus, the trial court's ruling on the entitlement issue was correct as a matter of law based on plaintiffs' judicial admissions.

### C. Reasonableness of Attorney Fees Award

Prior to briefing on the merits in this matter, we ordered the parties to brief the procedural issue of whether plaintiffs' failure to provide reporter's transcripts or suitable substitutes warranted affirmance based on the inadequacy of the record. (See *Foust, supra,* 198 Cal.App.4th at p. 186 ["Generally, appellants in ordinary civil appeals must provide a reporter's transcript at their own expense. (*City of Rohnert Park v. Superior Court* (1983) 146 Cal.App.3d 420, 430-431 [193 Cal.Rptr. 33].) In lieu of a reporter's transcript, an appellant may submit an agreed or settled statement. (*Leslie v. Roe* (1974) 41 Cal.App.3d 104 [116 Cal.Rptr. 386]; Cal. Rules of Court, rules 8.134, 8.137"].)

On the issue of the reasonableness of the amount of attorney fees awarded, the record is inadequate. A trial court's determination of the amount of attorney fees to award is reviewed for an abuse of discretion. "We review a challenge to the amount of a fee award under the abuse of discretion standard. (*Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1509 [95 Cal.Rptr.3d 343].) '"[A]n experienced trial judge is in a

much better position than an appellate court to assess the value of the legal services rendered in his or her court, and the amount of a fee awarded by such a judge will therefore not be set aside on appeal absent a showing that it is manifestly excessive in the circumstances." [Citation.] "The only proper basis of reversal of the amount of an attorney fees award is if the amount awarded is so large or small that it shocks the conscience and suggests that passion and prejudice influenced the determination."' (*Ibid.*)" (*Faton v. Ahmedo* (2015) 236 Cal.App.4th 1160, 1173.)

Although the trial court's order awarding attorney fees is in the record, it does not reflect the trial court's reasoning for accepting the defendant's calculation of the lodestar amount. Instead, it reflects only the trial court's reasoning for denying defendant's request for a multiplier or enhancement. Thus, without a reporter's transcript, there is no basis upon which to review the reasoning underlying the trial court's determination of the amount of attorney fees to award. The record is therefore inadequate to review plaintiffs' abuse of discretion contention. (See *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447 [affirming judgment because the record was inadequate to conclude the trial court abused its discretion in determining the attorney fee was reasonable].) As explained above, because the trial court correctly concluded that defendant was entitled to recover attorney fees, we affirm, based on the inadequacy of the record, that portion of the trial court's order setting the amount of reasonable attorney fees.

## DISPOSITION

The judgment and order awarding attorney fees are affirmed. Defendant is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, Acting P. J.

We concur:

KRIEGLER, J.

KIRSCHNER, J.*

* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.